(6)

No. 00-1168

IN THE

Supreme Court of the United States

ROYAL DUTCH PETROLEUM COMPANY AND THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C.,

Petitioners,

v.

KEN WIWA, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF HIS DECEASED FATHER, KEN SARO-WIWA, OWENS WIWA, BLESSING KPUINEN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HER HUSBAND, JOHN KPUINEN, AND JANE DOE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF NEW YORK STOCK EXCHANGE, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Jay N. Fastow (*Counsel of Record*)
Adam P. Strochak
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Counsel for Amicus Curiae New York Stock Exchange, Inc.

February 21, 2001

16 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. LISTED COMPANIES' INVESTOR RELATIONS PROGRAMS SERVE AN IMPORTANT PUBLIC INTEREST BY FOSTERING AN EFFICIENT MARKETPLACE FOR EQUITY SECURITIES 4

II. LISTING ON THE NYSE AND ACTIVITIES ANCILLARY THERETO DO NOT CONSTITUTE "DOING BUSINESS" 8

III. THE COURT OF APPEALS' DECISION MAY ADVERSELY AFFECT THE EFFICIENCY OF THE U.S. MARKET FOR THE SECURITIES OF NON-U.S. COMPANIES AND THE ABILITY OF THE U.S. SECURITIES MARKETS TO COMPETE WITH NON-U.S. MARKETS FOR FOREIGN LISTINGS 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Celi v. Canadian Occidental Petroleum Ltd., 804 F. Supp. 465 (S.D.N.Y. 1992) 9

Clews v. Woodstock Iron Co., 44 F. 31 (S.D.N.Y. 1890) ... 9

Cotugno v. Union Pacific R.R., 177 N.Y.S.2d 126 (Sup. Ct. 1958) 9

Feldman v. Silverleaf Resorts, Inc., No. 98 Civ. 4566, 2000 U.S. Dist. LEXIS 1005 (E.D.N.Y. January 31, 2000) 10

Freeman v. Bean, 266 N.Y. 657 (1935) 8

Grossman v. Sapphire Petroleum Ltd., 195 N.Y.S.2d 851 (Sup. Ct. 1959) 9

Industrial Acoustics Co. v. Energy Services, Inc., No. 93 Civ. 2865 (MBM), 1994 U.S. Dist. LEXIS 4470 (S.D.N.Y. Apr. 7, 1994) 9

Joseph Walker & Sons v. Lehigh Coal & Navigation Co., 167 N.Y.S.2d 632 9

Robbins v. Ring, 166 N.Y.S.2d 483 (Sup. Ct. 1957) 9

Sunrise Lumber Co. v. Homer D. Biery Lumber Co., 195 A.D. 170 (1921) 9

Statutes

15 U.S.C. § 78c(a)(26) 2

15 U.S.C. § 78f(b)(5) 2

Other Authorities

New York Stock Exchange, Inc., *Shareownership 2000* (http://www.nyse.com/marketinfo/marketinfo.html) 4, 5

IN THE

Supreme Court of the United States

No. 00-1168

ROYAL DUTCH PETROLEUM COMPANY AND THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C.,

Petitioners,

v.

KEN WIWA, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF HIS DECEASED FATHER, KEN SARO-WIWA, OWENS WIWA, BLESSING KPUINEN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HER HUSBAND, JOHN KPUINEN, AND JANE DOE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF NEW YORK STOCK EXCHANGE, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

New York Stock Exchange, Inc. ("NYSE") respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari.[1] NYSE's comments are limited to the

[1] The parties have consented to NYSE's participation as amicus curiae, and letters of consent have been filed with the Clerk of the Court. *(footnote continued. . .)*

third question presented by the petition – whether general personal jurisdiction may be asserted over non-U.S. corporations whose only contacts with the forum consist of activities directed at facilitating relations with investors in the corporations' publicly traded securities. NYSE expresses no views on the other questions presented.

INTEREST OF AMICUS CURIAE

NYSE is a corporation organized under the New York Not-For-Profit Corporation Law. It is registered as a national securities exchange with the Securities and Exchange Commission, and is a self-regulatory organization within the meaning of section 3 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78c(a)(26). NYSE's principal activity is the operation and regulation of an auction market for the purchase and sale of equity securities listed for trading on NYSE. Among its various requirements, the Exchange Act obligates NYSE to adopt and enforce rules that are designed "to remove impediments to and perfect the mechanism of a free and open market. . . and, in general, to protect investors and the public interest." 15 U.S.C. § 78f(b)(5) (describing obligations of a national securities exchange).

As of February 6, 2001, securities of 432 non-U.S. companies from 51 countries, including both petitioners in this case, were listed for trading on NYSE. NYSE competes with other securities markets in the United States and abroad for companies, including non-U.S. companies, to list their securities for trading.

No counsel for any of the parties authored this brief, in whole or in part, and no one other than NYSE made a monetary contribution to its preparation or submission.

The decision of the United States Court of Appeals for the Second Circuit in this case, holding that a non-U.S. corporation may be subject to general personal jurisdiction based on the presence in New York of an investor relations office, may cause non-U.S. companies to refrain from performing investor relations functions in the United States, creating an informational disadvantage for their shareholders in the United States and reducing the efficiency of the market for their shares in this country. The decision even may cause some non-U.S. companies to rethink the decision to list their shares in the United States altogether. Such an effect potentially could weaken the ability of U.S. securities markets to compete for non-U.S. listings, and effectively deprive U.S. investors of the legal and other benefits of investing in such companies on U.S. markets.

SUMMARY OF ARGUMENT

Tremendous growth in trading volume in recent years, along with the globalization of markets, have made an effective investor relations program an integral aspect of stock exchange listing. Investor relations professionals in the United States are a critical point of contact between many non-U.S. issuers, the stock markets, and the investing public, facilitating the prompt and efficient transfer of information that can have a significant effect on the market for the companies' shares. By facilitating the timely dissemination of information to the investing public, performance of investor relations functions in the United States assists in the operation of an efficient market for a company's securities.

It long has been recognized that a company is not doing business in New York merely by taking ancillary steps in support of an NYSE listing. The Court of Appeals departed from this long-standing precedent in concluding that the presence of petitioners' investor relations staff in New York constitutes "doing business" in the state for purposes of gen-

eral personal jurisdiction. In today's global economy, where an increasing percentage of people invest in corporate securities, investor relations activities play an important role in protecting the interests of investors. They therefore should be considered as a matter of law to be ancillary to the listing of securities of non-U.S. companies.

ARGUMENT

I. LISTED COMPANIES' INVESTOR RELATIONS PROGRAMS SERVE AN IMPORTANT PUBLIC INTEREST BY FOSTERING AN EFFICIENT MARKETPLACE FOR EQUITY SECURITIES

In recent years, the securities markets in the United States have undergone dramatic changes. Perhaps the most significant has been a substantial increase in the number of individuals buying and selling stocks, many through low-cost online brokerage firms.[2] As a result, more people in the United States than ever before are investing a portion of their savings directly in stocks. For many U.S. investors, the purchase of shares of non-U.S. companies is a way to diversify their stock holdings and spread their risk exposure across geographic sectors.[3] In addition, globalization often has removed the significance of domicile in determining which are the leading companies in a particular industry. Participation in the growth of the leading companies in many sectors to-

---

[2] *See* New York Stock Exchange, Inc., *Shareownership 2000*, at 11 (*available at* http://www.nyse.com/marketinfo/marketinfo.html) (reporting statistical data about holdings of securities in U.S. and non-U.S. companies by U.S. investors based on the 1998 Survey of Consumer Finances, a household survey conducted under the auspices of the Federal Reserve Board).

[3] *See id.* at 40. In 1998, almost 3.7 million individuals in the United States directly held shares of non-U.S. companies. *Id.* at 45. When holders of mutual funds are added, the number of U.S. investors in securities of non-U.S. companies rises to 37.6 million. *Id.* at 48.

day requires many U.S. investors to transcend geographic borders.

A few statistics about the operations of NYSE and share ownership among individuals in the United States illustrate the effects of these changes on the securities markets. Between 1996 and 2000, the average daily trading volume on NYSE increased from about 400 million shares per day to over 1 billion. At the end of 2000, shares of 2,862 companies were listed on NYSE, representing $17 trillion in global market capitalization. Perhaps most significantly, the number of individual U.S. investors who directly own stocks rose from 27.4 million in 1995 to 33.8 million in 1998.[4]

Changes to NYSE's non-U.S. stock listings have been equally dramatic. As of February 6, 2001, securities of 432 non-U.S. companies were listed for trading on NYSE, up from just 96 companies in 1990. In 2000 alone, NYSE added 61 non-U.S. company listings, and NYSE trading volume in non-U.S. securities averaged 100.2 million shares per day, an increase of 53 percent over the 1999 average. The trading of securities of non-U.S. issuers today represents approximately 10 percent of the total average trading volume on NYSE.

In addition to increases in the number of individual investors and diversification of their portfolios with foreign securities, there have been marked changes in the ways investors educate themselves about the stocks they buy and sell. The proliferation of sources for financial news – especially the internet and cable television – has substantially increased the speed at which information affecting investment decisions is disseminated to the investing public and the speed at which such information is reflected in stock prices.

---

[4] *See id.* at 15.

In the current market environment, it has become increasingly important for listed companies to maintain an effective investor relations program. Investor relations professionals serve an important role in conveying relevant information to individual and institutional shareholders, securities analysts, and the U.S. securities markets, thereby helping to maximize the efficiency of the market for a company's securities. Investor relations offices also perform the function of communicating investor expectations, interests, and concerns to company management. Investor relations functions thus now have become an integral part of many corporations' listings on NYSE and other U.S. markets.

NYSE has compiled a checklist of investor relations "best practices" for successful listing drawn from the recommendations of leading securities industry sources, including the National Investor Relations Institute, a professional association of corporate officers and investor relations consultants. Among the steps NYSE recommends its listed companies take are:

- Providing U.S. investors with easy access to information, such as company press releases;
- Simultaneously releasing material news in the U.S. and the home country;
- Conducting analyst conference calls with a U.S. dial-in option;
- Implementing appropriate measures to ensure the accuracy of company information provided by commercial services; and
- Conducting regular surveys of market participants to understand market trends and investor expectations.

NYSE and securities industry trade groups affirmatively recommend to non-U.S. listed companies that, as part of their

investor relations program, they have a U.S. contact person for investor inquiries.

NYSE estimates that at least half of its 432 non-U.S. listed companies maintain an investor relations office in the United States, or retain a service here to perform those functions, and the trend toward having an investor relations presence in the United States is accelerating. Many non-U.S. companies that list their shares on NYSE maintain an investor relations function in New York City to have that function in close proximity to investors, financial analysts, and financial news media located there.

An investor relations presence contributes to an even playing field for all investors by neutralizing the inherent informational disadvantage a U.S. investor otherwise has relative to investors in the issuer's home market. A listed company's investor relations staff in New York (or elsewhere in the United States) also serves as an important point of first contact for NYSE staff in the event there is breaking news that could have a significant effect on share prices or unusual trading activity in the company's shares. In modern financial markets, events unfold rapidly, frequently necessitating immediate communications between NYSE staff and informed representatives of listed companies.

In this regard, consider NYSE's Timely Alert policy – a communications program with which all NYSE-listed companies must comply. The Timely Alert policy seeks to maintain a level playing field for all investors by trying to ensure the investing public equal access to significant market-related information. Under the Timely Alert policy, a listed company must notify a designated NYSE staff member ten minutes before issuing a press release containing significant company information during trading hours. The purpose of this policy is to give NYSE an opportunity to assess whether trading in the company's securities should be halted temporarily to allow current and potential shareholders time

to assess the news and make an informed investment decision. Similarly, the Timely Alert policy requires a listed company to issue a press release within 30 minutes of being notified by NYSE of unusual trading activity in the company's stock, stating whether or not it knows of any reason for the unusual trading.

Even with the benefits of modern telecommunications technologies, the performance of these time-critical tasks across multiple time zones is difficult, and for that reason many listed companies (both U.S. and non-U.S.) locate their investor relations function in New York City. To illustrate the complexity associated with non-U.S. companies, imagine that unusual trading in the shares of such a company occurs at 2:00 P.M. in New York. With non-U.S. listed companies located in 51 countries, it might be well into the night at the company's headquarters, and NYSE staff may be unable to locate a knowledgeable contact person. As a result, NYSE might decide to halt trading for the rest of the day. If there is a knowledgeable investor relations staff person in New York, however, NYSE may be able to determine quickly the reason for the unusual trading activity, permitting the resumption of trading and the opportunity for all investors, large and small, to buy or sell the company's securities before the close of the trading day.

II. LISTING ON THE NYSE AND ACTIVITIES ANCILLARY THERETO DO NOT CONSTITUTE "DOING BUSINESS"

In a long line of precedent, state and federal courts in New York consistently have held that the listing of securities for trading on a stock exchange, and activities ancillary to such listing, do not constitute "doing business" and therefore are insufficient, without more, to subject a corporation to general personal jurisdiction under New York law. *See, e.g.*, *Freeman v. Bean*, 266 N.Y. 657 (1935) (holding that retention of transfer agent and registrar for stock in New York

City does not constitute transacting business in New York); *Sunrise Lumber Co. v. Homer D. Biery Lumber Co.*, 195 A.D. 170, 185 N.Y.S. 711 (1921) ("There is scarcely a considerable corporation anywhere in the United States which does not attempt to sell its stock and bonds through Wall Street houses. Such selling is not a doing of business by the corporation."); *Grossman v. Sapphire Petroleums Ltd.*, 195 N.Y.S.2d 851 (Sup. Ct. 1959) ("the fact that securities of a foreign corporation are traded on a stock exchange within the state does not constitute 'doing business' within the state for the purpose of conferring jurisdiction"); *Cotugno v. Union Pacific R.R.*, 177 N.Y.S.2d 126 (Sup. Ct. 1958) (maintaining transfer office as required by NYSE does not constitute doing business); *Robbins v. Ring*, 166 N.Y.S.2d 483 (Sup. Ct. 1957) (listing of shares on American Stock Exchange and retention of stock transfer agent in New York City does not constitute doing business); *Joseph Walker & Sons v. Lehigh Coal & Navigation Co.*, 167 N.Y.S.2d 632 (Sup. Ct. 1957) (sale of securities on NYSE, incidental maintenance of bank accounts for dividend payments, and designation of transfer agent and registrar in New York City do not constitute doing business); *Industrial Acoustics Co. v. Energy Services, Inc.*, No. 93 Civ. 2865 (MBM), 1994 U.S. Dist. LEXIS 4470 (S.D.N.Y. Apr. 7, 1994) (listing of stock on NYSE and maintenance of transfer agent and bank account in New York insufficient to constitute doing business); *Celi v. Canadian Occidental Petroleum Ltd.*, 804 F. Supp. 465 (E.D.N.Y. 1992) (listing of stock on American Stock Exchange does not constitute doing business); *Clews v. Woodstock Iron Co.*, 44 F. 31 (S.D.N.Y. 1890) (listing of bonds on NYSE does not constitute doing business).

One district court recently stated, in a similar context, that this line of cases is "particularly sensible" because, "if participation in New York's international financial markets alone could constitute 'doing business,' personal jurisdiction would be almost limitless and would no doubt raise consid-

erable constitutional concerns." *Feldman v. Silverleaf Resorts, Inc.*, No. 98 Civ. 4566, 2000 U.S. Dist. LEXIS 1005, at *13 (E.D.N.Y. January 31, 2000).

It thus long has been the rule that "a company is not 'doing business' in New York merely by taking ancillary steps in support of its listing on a New York exchange." Pet., App. A-14. The Court of Appeals concluded, however, that petitioners' investor relations activities resulted "not from legal or logistical requirements incumbent upon corporations that list their shares on the New York Stock Exchange, but from the [petitioners'] discretionary determination to invest substantial sums of money in cultivating their relationship with the New York capital markets." *Id.*

In reaching this conclusion, the Court of Appeals apparently did not fully appreciate the changes that have occurred in the securities markets in recent years and the important contribution investor relations professionals make to the efficient operation of those markets. Thus, while an investor relations program may or may not have been considered ancillary to listing on NYSE or another U.S. exchange 100, 50, or even 20 years ago, today it is very much so.

To be sure, an investor relations program with an office in New York is not a regulatory prerequisite to listing a company's securities on a U.S. stock exchange. The practical reality, however, is that trading of corporate securities in today's world requires considerable contact, on short notice, between U.S. securities markets and issuers. The purpose of this contact is to protect the myriad individual and institutional investors who buy and sell securities of non-U.S. listed companies on NYSE and other U.S. markets every day.

Investor relations professionals located in New York or elsewhere in the United States play a key role in maximizing the efficiency of the market for securities of non-U.S. issuers, and are an important aspect of the "best practices" recommended by NYSE to its non-U.S. listed companies.

Maintaining such an investor relations program to support an NYSE or other U.S. market listing inures to the benefit of all U.S. investors in the company's securities. Accordingly, the exercise of general personal jurisdiction over a non-U.S. corporation based only on the listing of its securities on a U.S. exchange and the performance of investor relations functions in New York conflicts with long-standing precedent and is inappropriate as a matter of law and policy.

III. THE COURT OF APPEALS' DECISION MAY ADVERSELY AFFECT THE EFFICIENCY OF THE U.S. MARKET FOR THE SECURITIES OF NON-U.S. COMPANIES AND THE ABILITY OF THE U.S. SECURITIES MARKETS TO COMPETE WITH NON-U.S. MARKETS FOR FOREIGN LISTINGS

The decision below has implications far beyond whether the petitioners will be required to defend a single lawsuit in federal district court in New York, making it worthy of certiorari. If maintaining an NYSE listing and an investor relations staff in New York is, as the Court of Appeals concluded, sufficient to establish general personal jurisdiction over a non-U.S. corporation, some non-U.S. companies may decide against locating or keeping investor relations functions in New York or, for that matter, anywhere in the United States. The unfortunate result of such a development would be a securities market in which information about those companies is less timely, impairing the efficiency of the market for U.S. investors.

Moreover, some non-U.S. companies may decide not to list (or to de-list) their securities on NYSE or other U.S. markets out of concern that they could be subject to the jurisdiction of state and federal courts in the United States for all manner of claims. In NYSE's experience, the risk and potential cost of litigation in the United States is one factor that non-U.S. companies typically evaluate carefully before

deciding to list their shares on a U.S. stock market. The Court of Appeals' decision in this case therefore may diminish the competitiveness of NYSE and other U.S. markets as they vie, along with other markets around the world, for non-U.S. company listings. If that happens, many investors in this country would lose the opportunity to diversify and invest in leading global companies that flows from the trading of non-U.S. company stocks on U.S. markets.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari on the third question presented by the petition.

Respectfully submitted,

Jay N. Fastow *(Counsel of Record)*
Adam P. Strochak
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

February 21, 2001

Counsel for Amicus Curiae New York Stock Exchange, Inc.